APPENDIX E

UNITED STATES DEPARTMENT
OF THE INTERIOR BUREAU OF LAND
MANAGEMENT
Office of Hearing Examiners
4209 Federal Building
Salt Lake City, Utah 84111

June 29, 1966

DECISION

UNITED STATES OF AMERICA,

Contestant,

v.

CLEAR GRAVEL ENTERPRISES, INC.,

Contestee

NEVADA 057075

Involving CLEAR GRAVEL Nos. 12 and 13 placer mining claims, situated in section 16, T. 21 S., R. 60 E., MDM, Clark County, Nevada. (Min. Pat. Apln. N-057075)

MINING CLAIMS HELD INVALID

Pursuant to the provisions of Title 43, Code of Federal Regulations, Subpart 1850,

the Bureau of Land Management, Reno, Nevada, filed a complaint dated April 7, 1964, against the captioned claims, alleging:

1. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.
2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not have been marketed at a profit prior to the Act of July 23, 1955.
3. The location of Clear Gravel No. 12 and Clear Gravel No. 13 placer mining claims were not made and are not now being held in good faith.

An answer was duly filed denying generally the allegations of the complaint.

A hearing on the issues was held on August 17 and 19, 1965, at Las Vegas, Nevada. Mr. Otto Aho, Office of the Solicitor, Reno, Nevada, represented the United States of America, and Mr. Herman M. Adams, attorney aw law, Las Vegas, Nevada, represented the contestee. Briefs have been filed by both counsel and, based on the record and the briefs, my decision follows.

The claims involved in this contest proceeding are located in the W½, section 16, Township 21 South, Range 60 East, Mount Diablo Base and Meridian, Clark County, Nevada, about 10 road miles from the center of Las Vegas. Small Tract Classification Order No. 95, dated October 2, 1957 (exhibit G-3) covered the area of these claims. This order was revoked on October 17, 1961 (exhibit G-4). On March 20, 1961, Clear Gravel Enterprises, Inc., filed mineral

patent application Nevada 057075 for the CLEAR GRAVEL Nos. 12 and 13 claims.

The history of the two claims in contest is contained in Government's exhibits 15 and 16 which are mineral reports prepared by Bureau of Land Management employees. According to these reports, on January 21, 1946, certain individuals located for sand and gravel 16 association placer mining claims of 160 acres each, covering 2,560 acres. Through a succession of quitclaim deeds, complete possessory title was vested in the Clear Gravel Enterprises, Inc., on September 25, 1953. On June 7, 1962, Clear Gravel Enterprises, Inc., received patent (Nevada 049497) to seven of the 16 claims - Clear Gravel Nos. 1, 2, 3, 4, 5, 6 and 14 - covering 1,120 acres. On April 8, 1963, the seven patented claims were sold to Rainbow Acres, Inc., for $2,300,000 (exhibit G-14).

The contested claims were jointly examined by two Bureau of Land Management mining engineers, Earl M. P. Lovejoy and Edgar A. Hollingsworth, and they prepared a mineral report in 1957 which recommended adverse proceedings against the CLEAR GRAVEL Nos. 12 and 13. Later, Hollingsworth examined the claims and his mineral report of February 15, 1962 (exhibit G-16) recommended that no action be taken against these claims and that they be considered valid. In a subsequent mineral report (exhibit G-15) prepared by Robert T. Webb, geologist, and Lewis G. Chichester, Jr., valuation engineer, dated July 22, 1963, it was recommended that the claims be contested.

Mr. Robert T. Webb, a geologist employed by the Bureau of Land Management, testified for the Government. He stated that he examined the claims, accompanied by Lewis G.

Chichester, on July 21, 1963, and on May 12 and August 16, 1965. During the 1963 examination several bulldozer cuts and backhoe trenches were observed but it could not be determined if gravel had been removed from any of them. There was a well and some equipment near the southeast corner of the CLEAR GRAVEL No. 12 claim. During the 1965 examinations the same bulldozer cuts and backhoe trenches were observed. He also saw seven pits on the claims, and gravel had been removed from six of these pits. The witness prepared exhibit G-6, a sketch map of the improvements found on the contested claims.

Clear Gravel No. 12 claim. The witness said he noted five bulldozer cuts averaging 20 to 60 feet long, 10 feet wide and 2 to 5 feet deep in the southeast corner of the claim. There were 14 backhoe trenches measuring 1-1/2 to 4 feet deep and

four churn drill holes approximately 4 to 6 inches in diameter. One well was observed on the surface, and cuttings, which the witness believed to be from another well, were also observed. Referring to exhibit G-6, the witness described the pits on the claim, as follows.

Pit A, in the northeast corner, was approximately 650 feet by 500 feet by 4 feet deep, and it was estimated that 15,000 yards of material had been removed. Pit B, near the east center of the claim, was approximately 650 feet by 235 feet by 4 feet deep and an estimated 15,000 yards of material had been removed. Pit C, a small pit on the east edge of the claim, had approximate dimensions of 20 feet by 10 feet by 3 feet deep and approximately 20 yards of material had been removed. Pit D, near the southeast corner of the claim, was 150 feet deep by 50 feet by approximately 6 feet

deep, from which about 1,700 yards of material had been removed and stockpiled adjacent to the pit. Pit E, a series of bulldozer cuts having approximate total dimensions of 40 feet long by 20 feet wide by 5 feet deep, showed no apparent removal of material from this pit. Pit F is on the boundary line between claims Nos. 12 and 13 and extends onto both claims. It was approximately 125 feet by 4 feet deep, and about 2,300 yards of material had been removed.

Clear Gravel No. 13 claim. Mr. Webb testified that he found five bulldozer cuts on this claim with average dimensions of 10 to 80 feet long by 10 to 20 feet wide and 2 to 3 feet deep, and 15 backhoe trenches 1 to 4 feet deep. Two pits were observed on this claim, one being the aforementioned Pit F, and the other is Pit G, located near the southeast corner. Pit G was 170 feet by

100 feet by 4 feet deep, and about 2,500 yards of material had been removed.

Mr. Webb said that Mr. Robert Underhill, General Manager and Secretary-Treasurer of Clear Gravel Enterprises, Inc., informed him that the above-described material had been removed by unknown contractors who had leased the claims but that he did not know for what purpose it had been used. The witness thought that the material was used for type 2 sub-base as there were two small stockpiles of material in Pit A that had been screened.

Mr. Webb further testified that materials on the north, west and east sides of the Las Vegas valley are similar to the material on the contested claims and are composed of limestone, dolomite fragments, some sandstone and minor amounts of chert and blowsand. The material in the stream

beds in these areas is generally better sorted and cleaner. The material on the south edge of the valley differs mineralogically from the other deposits in that these gravels are composed of volcanic fragments.

It was Mr. Webb's opinion that the material on the CLEAR GRAVEL Nos. 12 and 13 possesses no special qualities that would make it suitable for purposes other than general construction or building purposes. Also, the material on the claims could not have been extracted, removed and marketed at a profit prior to July 23, 1955. His opinion was based on studies of the existing gravel operators in the Las Vegas valley, on reports prepared by Bureau mineral examiners who were in the Las Vegas valley during 1955 and later years, from reviewing statistics of the Bureau of Mines regarding production of sand and gravel in the Las Vegas valley during 1955 and prior years,

and on the fact that in 1955 the market was being adequately satisfied by existing producers in the valley and that it would have been difficult for an additional producer to capture a portion of the market. Further, no material had been removed from the claims and entered into the market until sometime in 1963 or 1964.

Lewis G. Chichester, Jr., assistant land office manager, Branch of Minerals, Reno State Office, Bureau of Land Management, testifying on behalf of the Government, stated that on December 5, 1962, he and a Bureau geologist drove across the contested claims in a jeep and made a "windshield" examination of the claims. He accompanied Webb during the July 22, 1963, examination of the claims. He stated that during the 1963 examination he observed some equipment and a well on

the southeast corner of the CLEAR GRAVEL No. 12 claim that had not been there in 1962. He substantiated Webb's testimony, approved the recommendation that charges be filed against the claims, and stated that the claims could be profitably mined today because the market is greater and closer to the claims.

Two documents were introduced and identified as exhibit C-G. Testifying on behalf of the contestee, William Edward Adams, Assistant City Manager of the City of Las Vegas, Nevada, explained that this exhibit is a compilation of the total valuation of construction in Las Vegas for a period 1946 through 1955. These documents show only the value of family units plus the total value of permits, number of construction permits issued, and a breakdown sheet of the basic types of construction, the total construction costs and building permits

issued for the years 1953, 1954 and 1955. Mr. Adams further stated that the building activity increased from five million dollars in 1946, to 33 million dollars in 1955.

Contestee's witness, A. G. Blad, United States Commissioner and Vice President of Clear Gravel Enterprises, Inc., stated that he was one of the original locators of the claims on January 21, 1946. Bulldozer cuts and backhoe trenches were dug on both of the claims and good sand and gravel were found. According to Mr. Blad, the Clear Gravel Enterprises, Inc., entered into an agreement to lease some of the claims (including the contested claims) to Smith and Young on April 30, 1953, for a term of 15 months (exhibit C-H1). A new agreement dated May 29, 1954, extended the original lease agreement for five years (exhibit C-H2). From 1952 to 1956, Smith and Young were the second largest producers of sand and gravel in the area.

However, in 1956 their operations were terminated. Blad said that he and Messrs. Porter and Underhill, two of the original locators, had made plans to go into the sand and gravel business, but Porter and Underhill died before the plans were completed and he was unable to finance the operation alone.

Exhibit C-I is a letter dated March 27, 1963, from the Chief, Division of Lands and Minerals Management, Bureau of Land Management, Reno, Nevada, to Mr. R. W. Underhill, General Manager, Las Vegas Sand and Gravel Company, Inc. (now known as Clear Gravel Enterprises, Inc.). Mr. Blad said that it was this letter that advised his company that "unless the Small Tract applications were cleared off /Clear Gravel Enterprises/ were not to develop the property" (Tr. 137). The letter states, in part:

"This application insofar as the SW¼ /area covered by the CLEAR GRAVEL NO.

13 claim/ is concerned is in a suspended category pending final disposition of certain small tract applications * * *. /I/t would be prudent to refrain from any type of activity until the conflicting applications are resolved."

William D. Embry, who is presently employed as a bailbondsman and president of Clear Gravel Enterprises, Inc., was a witness for the contestee. He said he first became associated with Clear Gravel Enterprises, Inc., in 1954 or 1953. He served as vice president of the company prior to his becoming president. In 1955, he made an examination of the property with Mr. Asher, a registered civil engineer in the State of Nevada. At that time, 16 backhoe cuts were dug which corresponded to those outlined on exhibit G-6.

Mr. Embry testified that he had conversations with Bureau of Land Management employees regarding the activities on the CLEAR GRAVEL Nos. 12 and 13 while the Small Tract Order was still in effect. Although nothing was put in writing, he was told that until all outstanding small tract applications were cleared the company could be liable for damages for any material removed from the claims. The firm's counsel also advised against developing these claims until the small tract applications had been cleared. Mr. Embry said that the County Planning Board of Clark County also refused to approve the company's application for the same reason. Later, on October 6, 1964, the County Planning Board approved an application of Clear Gravel Enterprises, Inc., for a variance to mine sand and gravel, to construct and maintain an asphalt plant and concrete plant, and to manufacture all

types of road material (exhibit C-K).

According to Mr. Embry's testimony, the contestee entered into a "Lease and Royalty Agreement" dated December 1, 1961, with Engineered Concrete Corporation to mine and remove sand and gravel from all of the claims, patented and unpatented (exhibit C-D). This agreement was rescinded on March 21, 1963.

It is Mr. Embry's opinion that claims Nos. 12 and 13 could have been profitably mined in 1953, 1954 and 1955 because the quality of the gravel on the claims tested higher than other gravel pits in the valley (exhibit C-C) and that these claims were closer to Las Vegas than other pits that were being operated for sand and gravel at that time. He further stated that CLEAR GRAVEL Nos. 12 and 13 were not mined at that time because it was believed unnecessary to operate all of the mines simultaneously.

Contestee's witness, Robert W. Underhill, General Manager and Secretary-Treasurer of Clear Gravel Enterprises, Inc., testified that in 1941, A. G. Glad, J. D. Porter and Clarence C. Underhill (his father) located 16 mining claims covering 2,560 acres, which included the CLEAR GRAVEL Nos. 12 and 13 claims. The development of the claims was delayed due to the deaths of J. D. Porter and his father. He said it was difficult to find substantial lessors because of the small tract applications that were filed on the claims. He believes the Nos. 12 and 13 claims could have been profitably mined prior to 1955 because at the time Smith and Young were negotiating to least the 16 claims, the CLEAR GRAVEL Nos. 12 and 13 were included in the contemplated operation. However, since these claims were too close to Wells Cargo Sand and Gravel operations, Smith and Young decided to mine the Clear Gravel No. 1.

On being questioned regarding the sale of property, Mr. Underhill said the reason Clear Gravel Enterprises, Inc., sold the seven patented claims to Rainbow Acres was because the organization was $35,000 in debt, taxes were due, and it was feared the patented land would be lost. After the sale, Clear Gravel Enterprises, Inc., still had 1,120 acres and that, other than Clear Gravel No. 1 which was being mined, the claims were being held for reserves.

George D. Lewis, son-in-law of the late J. D. Porter, testified for the contestee. He stated that samples were taken from the Clear Gravel Nos. 4, 10 and 11 claims and delivered to O. J. Scherer, President of the Nevada Testing Laboratories, for testing (see deposition of O. J. Scherer, exhibit C-C). The results of these tests met the specifications

required by the Nellis Air Force Base and material from these claims was used at the base.

Contestee's witness, William C. Hartman, Vice-President of Wells Cargo, Inc., testified that their sand and gravel plant is one-half mile due east of the contested claims. He said the material they are mining is a better quality than material elsewhere in the valley and that although the distance from their pit to market is slightly greater than some of the other producers of sand and gravel, they are competitive because the haul is downhill and through less traffic and school zones. He stated that there has been continued growth in the building business from 1951 through 1955. In his opinion, the contested claims could have been economically mined in 1955 and prior thereto because the claims are only one-half mile from the Wells Cargo's pit which had been profitably mined

at that time.

The law governing the validity of sand and gravel placer mining claims is well established. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in Castle v. Womble, 19 I.D. 455, 457 (1894).

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

With respect to widespread nonmetallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in

order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and marketed at a profit. Layman v. Ellis, 54 I.D. 296 (1933). See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

Since the claims were located prior to the Act of July 23, 1955 (69 Stat. 368, as amended, 30 U.S.C. 611 (1964)), the date on which deposits of common varieties of sand and gravel were removed from the category of valuable mineral deposits locatable under the

mining laws, the contestee must establish either that it made a discovery prior to July 23, 1955, or that the material on the claims includes deposits which are valuable because they have some property giving them a special or distinct value. United States v. Keith J. Humphries, A-30239 (April 16, 1965).

The contestee contends that the leasing of the 16 claims, covering 2,560 acres of sand and gravel, in 1953 to Smith and Young, and the fact that Smith and Young would have mined claims Nos. 12 and 13 in 1953 rather than Claim No. 1 if the two claims in contest had not been in such close proximity to the Wells Cargo operation, shows that the sand and gravel on Claims Nos. 12 and 13 were marketable prior to July 23, 1955. The contestee also contends that the two claims are only one-half mile east of the Wells Cargo operation,

which was being profitably mined prior to July 23, 1955, and, therefore, could have been profitably mined at that time. However, the contestee had done nothing to prepare the sand and gravel on these claims for market. Material from claims not included in this contest was tested by the Nevada Testing Laboratories in 1956, but no tests were made of the quality and quantity of the sand and gravel on the contested claims. Bona fides in development, along with the existence of a present demand and other factors, are necessary to validate sand and gravel claims such as these and, in their absence, the claims are not valid. Foster v. Seaton, supra; United States v. Reed H. Parkinson, A-28144 (February 1, 1960); United States v. Thomas R. Shuck et al., A-27965 (February 2, 1960); affirmed, Shuck v. Helmandollar, Civil No. 682 Pct., D.C. Arizona, December 7, 1961.

Counsel for the contestee introduced exhibits C-D1 through C-D5 (building permits) which reflect the growth of the building industry in Clark County from 1951 to and including 1955. Also introduced was exhibit C-G which is a compilation of the total valuation of building construction in the City of Las Vegas for the period of 1946 through 1955. A witness for the contestee stated that the building activity in the City of Las Vegas increased from five million dollars in 1946, to 33 million dollars in 1955. This is not evidence that the material on the claims was marketable in 1955 and prior thereto, but, to the contrary, it is evidence that the market was being adequately supplied by existing producers. The evidence shows that no material had been removed from the claims and entered into the market until 1963 or 1964. This, then, indicates that the material from the

claims could not have competed in the market prior to July 23, 1955.

The burden of proving a discovery of a common variety of sand and gravel on the claims prior to July 23, 1955, or the discovery of an uncommon variety at any time vested on the contestee. Foster v. Seaton, supra; Osborne v. Hammitt, Civil No. 414, D.C. Nevada, August 19, 1964.

The contestee contends it was deterred from developing the claims as a result of advice by Bureau personnel that it might be liable for damages for material removed, and because of a letter from the Bureau of Land Management dated March 27, 1963, which stated that it would be prudent to refrain from any type of activity (on CLEAR GRAVEL No. 13) until the conflicting (small tract) applications are resolved. This contention is without merit since a discovery had to be made by July 23, 1955, for the claims to be

valid, and if a discovery had not been made until 1963 the claims are not valid.

Contestee further argued that the Clark County Planning Board refused to approve its application to conduct a sand and gravel operation on the claims until 1964. Assuming that this occurrence is relevant, it does not prove that the material on the claims was marketable.

There remains only the allegation that the sand and gravel were of better quality than that found generally in the area. Even if it be assumed that this contention is correct, it does not aid the contestee, for, as the Department has held, the fact that sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other